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86-918

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CITY AND COUNTY OF SAN FRANCISCO, etc., et al.,
Petitioners,

VS.

CHRISTIAN SCIENCE READING ROOM
JOINTLY MAINTAINED, etc., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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66 pp

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit err in refusing to apply the public forum doctrine in determining the validity of petitioners' policy excluding religious activities from government property dedicated to commercial uses?

2. Does a federal court violate the doctrine of separation of powers embodied in the rational basis standard of review by declaring irrational a regulation based on the government's "mistaken view" of the regulator's constitutional duties and by declining to consider other grounds advanced at trial because the government, having failed to state alternative grounds at the time of its adoption of the challenged regulation, "cannot reasonably be understood to have entertained" those other grounds?

LIST OF ALL PARTIES

Petitioner City and County of San Francisco is a municipal corporation and the owner of the real property and facilities that comprise San Francisco International Airport. Petitioner Airports Commission of the City and County of San Francisco is vested by the San Francisco City Charter with the management and control of San Francisco International Airport. Petitioner Louis A. Turpen is the duly appointed and acting Director of Airports of the City and County of San Francisco.

Respondent Chiristian Science Reading Room Jointly Maintained is a California non-profit religious corporation. Respondent David M. Sacks is a member of Christian Science Reading Room Jointly Maintained.

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OCTOBER TERM, 1986

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,
AIRPORTS COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO,
and LOUIS A. TURPEN, Director of Airports of the City and County of San Francisco,
Petitioners,

VS.

CHRISTIAN SCIENCE READING ROOM JOINTLY MAINTAINED,
a California non-profit religious corporation,
and DAVID M. SACKS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners City and County of San Francisco, et al., respectfully pray that a Writ of Certiorari be issued to review the judgment and the opinion, as amended, of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 784 F.2d 1010, and is reprinted in Appendix C hereto, p. A-4, *infra.* The opinion was amended by Order of the Court.

The amendment is reported at 792 F.2d 124; and it is reprinted in Appendix B hereto, p. A-2, *infra*.

The opinion of the United States District Court for the Northern District of California (Conti, D.J.) was unreported; it is printed in Appendix E hereto, p. A-20, *infra*.

JURISDICTION

Respondents brought this suit in the Northern District of California invoking federal jurisdiction under 42 U.S.C. Section 1983. The District Court's jurisdiction was based on 28 U.S.C. Sections 1331 and 1343(3). On May 8, 1984, the Northern District issued a permanent injunction and entered judgment for respondents. See Appendix D, p. A-18, *infra*.

On petitioners' appeals, the Ninth Circuit, on March 14, 1986, entered a judgment and an opinion affirming the Northern District's judgment. The opinion was amended by Order of the Ninth Circuit on June 16, 1986. See p. A-2, *infra*. Petitioners sought a petition for rehearing; it was denied on September 4, 1986. See Appendix A, p. A-1, *infra*.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY, ETC., PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdicition thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Title 42 U.S.C. Section 1983, provides, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. San Francisco Charter Sections 3.690 through 3.693, inclusive, create, and set forth the powers and duties of, the Airports Commission of the City and County of San Francisco and the office of Director of Airports. Those Charter provisions are printed in Appendix F hereto, p. A-34, *infra*.

5. Resolution No. 84-0091 of the Airports Commission of the City and County of San Francisco, which Resolution is the subject of this litigation, provides as follows:

> It is the policy of the Airports Commission not to provide space at San Francisco International Airport for the conduct of religious activities, except as specified by its Rules and Regulations related to First Amendment activities.

6. The Rules and Regulations related to First Amendment activities promulgated by the Airports Commission of the City and County of San Francisco are set forth in Airports Commission Regulation No. 1.3.3(K), which regulation is set forth in Appendix G hereto, p. A-37, *infra*.

STATEMENT OF THE CASE

This case concerns the constitutionality of the decision of Petitioner Airports Commission of the City and County of San Francisco ("the Airports Commission") to discontinue renting commercial space in the terminals at San Francisco International Airport for the practice of religion. Respondent Christian Science Reading Room Jointly Maintained ("Christian Science") asserts that it is guaranteed the right, under the First Amendment's Free Speech and Free Exercise of Religion Clauses, to rent commercial space to be used as a place for "meditation and devotional reading" of Christian Science materials. Christian Science also contends that the Airports Commission's decision declining to rent commercial terminal space for the conduct of religious activities denies equal protection of the laws to religious organizations, which Christian Science argues are a "suspect class."

Petitioners maintain that San Francisco International Airport ("the Airport") is a public utility, that commercial space in the Airport is not a public forum and that decisions of the Airports Commission in allocating Airport commercial space must be upheld as constitutional if the decision under attack is reasonable under the circumstances and involves no viewpoint discrimination.

The factual background of, and the circumstances surrounding, the challenged regulation, are as follows:

Petitioner City and County of San Francisco ("the City") owns, and through the Airports Commission, manages and controls the Airport. Measured by passenger traffic, the Airport is one of the largest airports in the world.

Under San Francisco Charter Section 3.690, the members of the Airports Commission are "subject to recall and to suspension and removal in the same manner as elective officers." See p. A-34, *infra*.

The Airports Commission is responsible for the safety and security of the passenger public. The Airports Commission also has legal and contractual duties to operate the Airport as a business enterprise. The costs of operating the Airport, including

debt service expenses on revenue bonds are paid exclusively from rental of Airport property and from landing fees.

The Airport's airline tenants sued in 1979 over landing fee rates. Settlement of the case in 1981 included airline lease and use agreements whereby the City agreed to reimburse the airlines over 26 million dollars in disputed landing fees. All airlines and Airport users are bound by the lease and use agreements. Those agreements establish a formula for setting and adjusting both airline terminal rentals and landing fees. Terminal rentals charged airlines must equal the amount by which terminal operating expenses exceed commercial concession revenues. Under those agreements, the City is required to maximize revenues from concessionaires, lessees and other non-airline users.

The consistent policy and practice of the Airports Commission and Director of Airports is to rent commercial space only through competitive bidding. Christian Science is the only "concessionaire" to rent space under an unbid permit.

Airport administrators are responsible for ensuring that scarce concession space be put to its highest and best use. In 1983, the year prior to the commencement of this litigation, the Airports Commission received over five hundred proposals for leasing its total of fifty concession spaces. Concession rental spaces are bid for and awarded on the basis of a percentage of the gross revenue against a minimum annual guaranteed rent for the use identified by the Airport's staff. In 1983, Airport concession revenue exceeded 41 million dollars. At the time of trial, Christian Science paid approximately thirty dollars per square foot per year, or one-tenth the average rent paid by the Airport's commercial concessionaires.

Although potential revenue is important in concession space allocation decisions, the primary criterion is whether a particular concession meets the needs and desires of the passenger public. Passenger needs are identified through passenger surveys, commercial marketing surveys and Airport staff observations of product and service mixes at other major world airports. The passenger surveys conducted prior to the commencement of this

action identified absolutely no need or desire for a place to worship or a place for "devotional reading and meditation."

The Airports Commission must also consider other public policies in allocating Airport space, for example, meeting minority and women business enterprise goals and presenting an aesthetic atmosphere at the Airport. The Airports Commission terminated the Airport's advertising concession on the latter ground.

Airports Commission policy to date has assumed that members of the public have First Amendment rights in public areas within the terminals so long as they do not interfere with vital Airport functions or with embarking or disembarking passengers. The Airports Commission has adopted time, place and manner regulations for the conduct of First Amendment activities on Airport property. See Airports Commission Regulation No. 1.3.3(K), Appendix G, p. A-37. In the twelve months preceding the commencement of this litigation, over two hundred political, educational, youth and religious organizations were granted permits for activities involving speech, religious practices and solicitation of funds.

Respondent Christian Science began operating its reading room in 1957 for the express purpose of "devotional reading and meditation." At that time the Airport was operated by the City's Public Utilities Commission. (The Airports Commission was created pursuant to an amendment to the San Francisco Charter in 1970.) Prior to 1976, Christian Science operated under leases. Since 1976 Christian Science continued to occupy concessionaire space under a permit revocable by either party upon thirty days' notice. The Director of Airports has no legal or contractual obligation to state any reason for terminating a 30-day permit, and Christian Science may terminate its permit without stating any reason therefor.

The instant dispute began in January, 1981, when an Episcopal minister's request to rent office space to carry out his ministry was denied based upon the Airports Commission's regulations governing First Amendment activities. See pp. A-39 – A-40 (para. 5), *infra*.

Having denied the minister's request, the former Director of Airports, on April 13, 1981, wrote the Chairman of the Board of Christian Science stating that he was terminating Christian Science's 30-day permit because of an overall shortage of rentable space and because of recent requests for dedication of additional space for religious activities. In that letter, the former Director of Airports did not allude to the Airports Commission's regulations governing First Amendment activities but stated only that he had been advised by counsel that Christian Science's continued occupancy of concessionaire space would violate the California State Constitution's religion clauses.

Although the City's Charter does not empower the Mayor of San Francisco to administer any aspect of Airport affairs, Christian Science nevertheless sought and obtained the assistance of the Deputy Mayor to continue operating its reading room at the Airport. No further action to terminate Christian Science's permit was taken until January 10, 1984. At that time, the current Director reminded Christian Science that the policy of the Airports Commission is not to allocate space for the conduct of First Amendment activities, including religious activities, except in free speech booths designated for such purposes. The Director of Airports, however, permitted Christian Science to continue operating its reading room until the Airport's terminal reconstruction project required its closing. On March 21, 1984, the Director of Airports revoked Christian Science's 30-day permit stating that the renovation project had proceeded to a point that required the closing of the reading room. Christian Science responded by requesting the Airports Commission to instruct the Director of Airports to withdraw the termination notice. The Commission declined, and on April 17, 1984, adopted Resolution No. 84-0091, quoted *supra*, at p. 3, reaffirming its policy not to rent concession space for the conduct of religious activities.

On April 19, 1984, Christian Science filed an application for a temporary restraining order and a complaint for preliminary and permanent injunction seeking to prohibit petitioners from enforcing the termination of its permit. The District Court granted a temporary restraining order on April 20, 1984. The Court further ordered the consolidation of the hearing on the preliminary

injunction with the trial on the merits and set the trial for April 27, 1984.

On May 8, 1984, the District Court issued a permanent injunction and entered judgment for respondents. The District Court found no violation of Christian Science's alleged free speech rights but concluded that petitioners had violated its right to free exercise of religion. The District Court also concluded, without discussion, that religion is a suspect class and that the regulation did not withstand strict scrutiny (i.e., the regulation was not the least restrictive means of achieving a compelling governmental interest). Although the District Court prohibited petitioners from enforcing the previous termination notice, it also ruled that Christian Science is a month-to-month tenant with no vested right to occupy rental space. The District Court further ruled that the City may terminate Christian Science's permit for valid commercial reasons and that the City may relocate Christian Science's reading room to "comparable" space. However, in the post-judgment proceedings, the District Court ordered the City to attempt to reach an agreement on a site for the reading room, stating that if the parties could not agree on a new site the Court would choose one. The Director of Airports issued a permit for one of the spaces Christian Science had selected, as ordered by the District Court.

On appeal, the Ninth Circuit declined to address the issues of whether religions, taken together, constitute a suspect class for purposes of the Fourteenth Amendment's Equal Protection Clause or whether Christian Science has a right under the First Amendment's Free Exercise Clause to rent commercial concessionaire space at the Airport. Appendix C, p. A-8, *infra*. Rather, the Ninth Circuit ruled that the Airports Commission's actions do not even meet the rational relationship test. *Id.*

The Ninth Circuit noted that the petitioner had advanced three purposes for its policy not to rent concessionaire space for the practice of religion: First, compliance with the Establishment Clauses of the United States and California Constitutions; second, maximization of Airport revenue; and, third, serving the desires of the traveling public. Appendix C, p. A-9, *infra*. In its original opinion, the Ninth Circuit refused to consider the latter

two purposes because they were "not the actual purposes of the governmental policy." In its amended opinion, the Ninth Circuit deleted the language referring to the "actual purposes" of the Airports Commission, and stated in its stead that the Commission "cannot reasonably be understood to have entertained the maximization of revenue or the desires of the public as purposes underlying its adoption" of the challenged regulation.

The Ninth Circuit went on to rule that the Airport's continued rental of concessionaire space for the practice of religion violates neither the United States Constitution's nor the California Constitution's Establishment Clauses. The Ninth Circuit concluded,

> Thus, the new policy that the Airport adopted did absolutely nothing to advance the Airport's purpose [of complying with the United States and California Constitutions]. A fortiori, the classification of tenants into two groups, religious organizations and all others, did not rationally further that purpose.

On March 27, 1986, petitioners filed a petition for rehearing and suggestion for rehearing *en banc*. The basis for the petition was three-fold: First, the Ninth Circuit's opinion overlooked material law enunciated in *Vance v. Bradley*, 440 U.S. 93, 110-111 (1979) and conflicted with other Ninth Circuit opinions in *Brandwein v. California Board of Osteopathic Examiners*, 708 F.2d 1466 (9th Cir. 1983), and *Lamb v. Scripps College*, 627 F.2d 1015 (9th Cir. 1980). Those cases hold that under the rational basis test, reviewing courts may hypothesize the legislative purposes; and where there are plausible reasons for the adoption of a regulation, the court's inquiry must end because it is constitutionally immaterial whether this reasoning in fact underlay the legislative decision.

Second, the Ninth Circuit's opinion conflicted with *Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985) and overlooked material law set forth in California appellate opinions interpreting the California Constitution's Establishment Clauses. In *Carreras*, the Ninth Circuit had ruled that where both state and federal constitutional violations are raised, the federal court is required to

avoid the federal constitutional issue and decide first whether the state constitutional violation has been proved.

In their petition for rehearing, petitioners discussed several differences between the California courts' interpretation of the California Constitution's Establishment Clauses and the federal courts' interpretation of the First Amendment's Establishment Clause. Perhaps the most significant difference is that California courts require a clear secular purpose to support governmental action. *Feminist Women's Health Center, Inc. v. Philibosian,* 157 Cal.App.3d 1076, 1090 (1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1752, 84 L.Ed.2d 816 (1985). Federal courts may invalidate legislation on the ground that a secular purpose was lacking only when there is no question that the statute was motivated wholly be religious considerations. *Lynch v. Donnelly,* 465 U.S. 668, 680 (1984). Moreover, although potential political divisiveness is relevant in First Amendment Establishment Clause disputes only in cases involving subsidies to a religious institution, *Lynch,* at 684, California courts have ruled that potential for political divisiveness is a factor in judging the constitutionality of any state action. *Philibosian, supra,* at 1091, citing with approval *Lynch,* at 701-704 (dissenting opinion of Brennan, J.). Finally, the California Constitution requires that the state maintain both the reality of separation of church from state and the appearance of such separation (*Philibosian, supra,* at 1090). Public perception of an alignment between the state and church is not determinative of federal Establishment Clause violations because "on occasion some advancement will result from governmental action." *Lynch, supra,* at 683.

Third, petitioners argued in their petition for rehearing that the Ninth Circuit, in refusing to apply the public forum doctrine instead of traditional equal protection analysis, overlooked material law set forth in *Cornelius v. NAACP Legal Defense and Education Fund,* 473 U.S. ____, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

On June 16, 1986, while petitioners' petition for rehearing and suggestion for hearing *en banc* was pending, the Ninth Circuit issued the order amending its opinion. Appendix B, p. A-2, *infra.*

On September 4, 1984, the Ninth Circuit denied petitioners' petition for rehearing. Appendix A, p. A-1, *infra.*

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S REFUSAL TO APPLY THE PUBLIC FORUM DOCTRINE TO THE AIRPORTS COMMISSION'S DECISION DECLINING TO PERMIT AIRPORT COMMERCIAL SPACE TO BE USED FOR RELIGIOUS PRACTICE CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

Without any discussion or citation to authority, the Ninth Circuit has refused to apply the public forum doctrine firmly established by this Court and consistently applied by other Circuits. Worse, the Ninth Circuit has fashioned its own unprecedented rational basis standard of review. Such a drastic departure from well-settled law governing access to government property for the exercise of First Amendment rights deserves the attention of this Court.

In a synthesis of the principles governing official decisions allocating the use of government property for First Amendment activities, this Court articulated the public forum doctrine in *Perry Education Assn. v. Perry Local Education Assn.*, 460 U.S. 37 (1983) and recently reiterated that doctrine in *Cornelius v. NAACP Legal Defense and Educational Fund, supra.*

Under the public forum doctrine, whether a right to use public property for activities protected by the First Amendment exists and the standards for evaluating limitations upon such a right depend "on the character of the property at issue." *Perry, supra,* at 44. Denial of access to traditional public fora, like parks and sidewalks, and to property opened by the government "for use by the public as a place for expressive activity" is subject to strict scrutiny. Content-based exclusions of communicative activities may be enforced in public fora only upon the government's showing that the exclusion "is necessary to serve a compelling state interest" and that the regulation "is narrowly drawn to achieve that end." *Id.*, at 45.

Decisions denying access to public property which is neither "by tradition or designation a forum for public communication" are not subject to strict scrutiny. *Perry, supra,* at 46. In such cases, a governmental entity

> may reserve the forum for its intended purposes, *communicative or otherwise,* as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's views. (Emphasis added.) *Id.,* at 46.

This Court has consistently affirmed two fundamental principles underlying the public forum doctrine: First,

> the Government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock,* 424 U.S. 828, 836 (1976), *quoted with approval in Cornelius, supra,* at 87 L.Ed.2d 578.

Second,

> [e]ven protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities. *Cornelius, id.,* at 578.

This Court has also made clear that the exercise of religion on government property is accorded no greater rights under the First Amendment than are accorded to the expression of political or social views:

> Nor . . . do religious organizations enjoy rights to communicate, distribute, and solicit on [government property] superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views. . . . *Heffron v. Interna-*

> *tional Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-653 (1981).

In applying its so-called rational basis test, the Ninth Circuit refused to consider the nature of the government property involved (i.e., Airport terminal space dedicated to commercial activity). Moreover, the Ninth Circuit refused to consider the inherent incompatibility between demands for a public utility's concession space dedicated to meeting the needs and desires of the passenger public and allocating some of that space for use as a place of worship where no passenger need has been identified.

The Ninth Circuit has, in other cases, applied the public forum doctrine to government property that is not by tradition or designation a public forum. *See, e.g., Carreras, supra.* In refusing to do so in this case, however, the Ninth Circuit appears to decide on an ad hoc basis and without any standards whether it will apply the public forum doctrine or whether it will apply, albeit erroneously, traditional equal protection analysis. This Court has never sanctioned such discretion, and the Ninth Circuit's decision clearly conflicts with this Court's rulings in *Perry* and *Cornelius.*

The decision below is also in conflict with *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105 (7th Cir. 1986). There a school teacher claimed a First Amendment free speech right to hold prayer and Bible discussion meetings with other teachers before the school day began and before the teachers were required to report for work. In upholding the district court's dismissal of the complaint, the Seventh Circuit reaffirmed its earlier decision that school property is not a public forum and that

> the "desire to avoid potentially disruptive political controversy and to maintain the appearance of neutrality is sufficient justification for excluding speakers from a non public forum" (citations omitted). *Id.*, at 1109.

In the instant case, the Ninth Circuit ignored the undisputed evidence of petitioners' concern for the appearance of neutrality. While several other religious organizations are only afforded non-exclusive access to the Airport's designated free speech booths, Christian Science is the only religion to occupy Airport concession space.

The Ninth Circuit's rejection of the public forum doctrine in this case also conflicts with *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986). In that case, the Second Circuit applied the analysis set forth in *Perry* and *Cornelius* in holding that a government owned sports arena is a "nonpublic forum." *Id.*, at 83. Hence, the court held constitutional an official policy that "makes distinctions on the basis of speaker identity." *Id.*, at 84, citing with approval, *Cornelius, supra.*

In light of the undisputed evidence that the Airports Commission's policy involved no viewpoint discrimination, the District Court and the Ninth Circuit erred in holding unconstitutional the Commission's distinction between commercial and religious activities. Under the public forum doctrine the Commission may make such distinctions provided they are reasonable. In departing from that doctrine and opting for its own version of equal protection analysis, the Ninth Circuit has created a precedent likely to generate confusion among the Circuits. The decision below is in direct conflict with this Court's rulings in *Perry* and *Cornelius* and with the rulings of the Seventh Circuit in *May* and of the Second Circuit in *Calash*. It is therefore essential that this Court give plenary consideration to this matter.

II

THE NINTH CIRCUIT'S APPLICATION OF THE RATIONAL BASIS STANDARD OF REVIEW SO AS TO PRECLUDE CONSIDERATION OF HYPOTHESIZED LEGISLATIVE PURPOSES RAISES IMPORTANT AND UNRESOLVED PROBLEMS

Even if the Ninth Circuit had properly refused to apply the public forum doctrine, it clearly misapplied the rational basis standard of review. The Ninth Circuit's failure to stay within the bounds of judicial review must be addressed by this Court.

Dismissing out of hand the legislative purposes advanced during this litigation as purposes that City officials "could not reasonably be understood to have entertained," the decision below makes clear the Ninth Circuit's view that public officials' state of mind is a material issue in resolving a constitutional challenge of

governmental action. Judicial inquiry into the state of mind of a legislative or executive body is unprecedented and must not be countenanced under the Constitution. Our public officials make thousands of decisions each day in which they establish the rules governing the administration of the affairs under their jurisdiction. The choices are rarely clear cut—the more difficult the decision, the more divided the community and its factions. These factions are animated by both reason and passion, conviction and expediency, altruism and greed, principle and prejudice. How then can the constitutionality of a governmental decision depend upon judicial inquiry into the state of mind of the public officials whose duty it is to exercise a democracy's delegated powers?

The simple answer is that, under our Constitution, it cannot. Democratic government moves from the premise that those who govern by consent reflect the wisdom of the community in their official decisions. (The members of the Airports Commission are appointed by the Mayor; they exercise the sovereign powers of the people of the City and County of San Francisco; and, like elected officials, they are subject to recall and to suspension and removal from office. San Francisco Charter Sections 3.690 and 3.691, pp. A-34 and A-35, *infra.*) Thus, where a challenged rule requires no heightened scrutiny, the judiciary must uphold it if it has any basis in reason. *Flemming v. Nestor,* 363 U.S. 603 (1960); *Vance v. Bradley, supra.* In holding that the courts may themselves suggest legitimate purposes that could be served by a particular rule, this Court has recognized and actively pursued its responsibility to ferret out rational justification for legislation and executive rulemaking. As this Court has admonished, the presumption of constitutionality "forbids us lightly to choose that reading of the [challenged rule's] setting which will invalidate it over that which will save it." *Flemming, supra,* at 617. Hence, courts must defer to the will of the people as expressed in the actions of their public officials if a rational basis exists for their actions. The constitutionality of official actions has never depended upon the vagaries of the decision makers' state of mind or their inability to articulate a rational justification. *Id.,* at 612. Refusing to consider grounds for the rental space decision other than the statements of Airport officials prior to the adoption of the challenged regulation, the Ninth Circuit ignores these established principles. The Ninth

Circuit has held a court need not consider legitimate governmental purposes that could rationally have prompted official action, unless it did so.

Contrary to the holding in the decision below, the Constitution does not empower the judiciary to strike down governmental action based on the court's perception that certain proffered purposes did not actually prompt the challenged action. *Flemming, supra.* This Court has roundly rejected such a role, concluding that such judicial inquiry is "at best a hazardous matter" and "a dubious affair indeed." *Id.*, at 617. Embarking on a course of inquiry so clearly reprehended by this Court, the decision below portends an unsettled future for executive rulemaking. Instead of giving traditional judicial deference to any number of hypothesized purposes for legislative action, courts following the decision below will be weighing the evidence, or even speculating, as in the instant case, on the officials' actual purposes that prompted a challenged regulation. The Ninth Circuit's failure to follow precedents mandating judicial deference to the government's identification and resolution of a societal problem renders meaningless the presumption of validity that clothes official actions.

Even if the rental of concession space to Christian Science does not violate federal or state Establishment Clauses, it is hardly irrational for the Airports Commission to want to avoid the divisive problems that attend such action, especially in light of its refusal to rent scarce space to the Episcopal minister. Aside from the Establishment Clause concerns, the desire to avoid this traditionally thorny problem is clearly a rational basis for the Airports Commission's policy.

It cannot be gainsaid that the separation of powers principle precludes judicial inquiry not only into "'. . . the wisdom [but also the] utility of legislation.'" *Minnesota v. Clover Leaf Creamery,* 449 U.S. 456, 469 (1981), quoting *Ferguson v. Skrupa,* 372 U.S. 726, 729 (1963). The Ninth Circuit not only has failed to adhere to these precedents in the decision below, but it has foisted upon each coequal branch of government the burden of proof that it is absolutely correct in both its identification of social problems and its selection of the means used to solve them.

Finally, the Ninth Circuit, in shifting the burden of proof under the rational basis standard of review from the challenger to the government, has repudiated basic rules of constitutional law and procedure. Because of the presumption of validity, the challenger has the "heavy burden" of proving that " 'the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational [citation omitted].' " *Hodel v. Indiana*, 452 U.S. 314, 332 (1981), and cases cited therein.

If allowed to stand, the decision below will launch federal courts upon an improper and dangerous course of inquiry into the actions of their coequal branches of government. The focus will be on the motives, state of mind, and wisdom of lawmakers and public administrators. It is folly to tie the enforceability of their official actions to their individual perceptions and predilections. Indeed, if a decision not requiring heightened scrutiny can be justified as rational, the principle of separation of powers demands that judicial inquiry end. Any other inquiry into the state of mind of public officials or their motives is improper and constitutes a breach of the court's duty to search for a way to uphold the decisions of the separate branches of government. As this Court remarked only last term. " '[T]he hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted [citation omitted].' " *Bowsher v. Synar*, 478 U.S. ____, 106 S.Ct. ____, 92 L.Ed.2d 583 (1986).

In light of the confusion created by the decision below, lower courts need guidance from this Court as to the proper application of the rational basis doctrine and the appropriate role of the judiciary in reviewing policies of the executive branch of government that animate and provide justification for executive action.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be granted.

Respectfully submitted,

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December 3, 1986

Appendix A

United States Court of Appeals
For the Ninth Circuit

Nos. 84-2076, 84-2415
D.C. No. CV 84-2087-SC

Christian Science Reading Room Jointly Maintained,
a California non-profit religious corporation,
and David M. Sacks,
Plaintiffs-Appellees,

vs.

City and County of San Francisco,
a municipal corporation;
Airports Commission of the
City and County of San Francisco;
Morris Bernstein, J. Edward Fleishell, Ruth E. Kadish,
Z.L. Goosby, and William K. Coblentz
as members of the Airports Commission of the
City and County of San Francisco; and
Louis A. Turpen, as Director of Airports of the
City and County of San Francisco,
Defendants-Appellants.

[Filed Sept. 4, 1986]

ORDER

Before: SKOPIL, REINHARDT, and HALL, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and an active judge called for a vote on whether to rehear the case en banc. A majority of the active judges did not vote for en banc consideration. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix B

Christian Science Reading Room Jointly Maintained, a California non-profit religious corporation, and David M. Sacks, Plaintiffs-Appellees,

v.

City and County of San Francisco, a municipal corporation; Airports Commission of the City and County of San Francisco; Morris Bernstein, J. Edward Fleishell, Ruth E. Kadish, Z.L. Goosby, and William K. Coblentz as members of the Airports Commission of the City and County of San Francisco; and Louis A. Turpen, as Director of Airports of the City and County of San Francisco, Defendants-Appellants.

Nos. 84-2076, 84-2415.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 11, 1985.

Decided June 16, 1986

Before SKOPIL, REINHARDT, and HALL, Circuit Judges.

ORDER

The opinion in this case, filed March 14, 1986, 784 F.2d 1010, is amended as follows:

784 F.2d at 1013 (left-hand column); slip op. at 9: delete "We are not bound . . . (1975)." and replace with:

> In considering the Airport's policy "we may consider purposes advanced by counsel for the [government] or suggested initially by ourselves," as long as "we are careful not to attribute to the [government] purposes which it cannot reasonably be understood to have entertained." *Delaware River Basin*

Commission v. Bucks County Water & Sewer Authority, 641 F.2d 1087, 1097 (3d Cir.1981).[2]

784 F.2d at 1013 (right-hand column); slip. op. at 9: add "or the desires of the traveling public" after "We do not suggest that revenue considerations"

784 F.2d at 1013 (right-hand column); slip op. at 9: delete "it is evident . . . new policy." and replace with:

> the Airport cannot reasonably be understood to have entertained the maximization of revenue or the desires of the public as purposes underlying its adoption of the new policy.

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[2] The Supreme Court cases on a court's ability to hypothesize purposes underlying a governmental policy are not altogether clear. In *Weinberger v. Wisenfeld*, 420 U.S. 636, 648 n. 16, 95 S.Ct. 1225, 1233 n. 16, 43 L.Ed.2d 514 (1975), the Court stated that a court should not consider a hypothesized purpose if it is clear that "the asserted purpose could not have been a goal of the [policy]." Five years later, in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 461, 66 L.Ed.2d 368 (1980), the Court stated that it is "constitutionally irrelevant whether [a hypothesized purpose] in fact underlay the [governmental] decision because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." In *Fritz*, however, there was no claim or evidence that the hypothesized purpose was not the actual purpose. Furthermore, six weeks after deciding *Fritz*, the Court reaffirmed *Wisenfeld* in *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 463 n. 7, 101 S.Ct. 715, 723 n. 7, 66 L.Ed.2d 659 (1981), when it quoted the *Wisenfeld* language verbatim.

The Third Circuit appears to be the only court that has attempted to harmonize the decisions. While we have used language like that used in *Fritz* in several cases, *see, e.g., Bunyon v. Camacho*, 770 F.2d 773 (9th Cir.1985); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985); *In re Lara*, 731 F.2d 1455 (9th Cir.1984); *Brandwein v. California Board*, 708 F.2d 1466 (9th Cir.1983); *Lamb v. Scripps College*, 627 F.2d 1015 (9th Cir.1980), we have never had to confront the problem posed in *Wisenfeld* and in the case before us. None of our prior decisions involved a case in which the record showed that the hypothesized purpose could not have been the actual purpose.

Appendix C

Christian Science Reading Room Jointly Maintained, a California non-profit religious corporation, and David M. Sacks, Plaintiffs-Appellees,

v.

City and County of San Francisco, a municipal corporation; Airports Commission of the City and County of San Francisco; Morris Bernstein, J. Edward Fleishell, Ruth E. Kadish, Z.L. Goosby, and William K. Coblentz as members of the Airports Commission of the City and County of San Francisco; and Louis A. Turpen, as Director of Airports of the City and County of San Francisco, Defendants-Appellants.

Nos. 84-2076, 84-2415.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 11, 1985.
Decided March 14, 1986.

Appeal from the United States District Court for the Northern District of California.

Before SKOPIL, REINHARDT, and HALL, Circuit Judges.

REINHARDT, Circuit Judge:

INTRODUCTION

The issue in the case before us is whether the decision of the San Francisco Airports Commission to terminate the tenancy of the Christian Science Reading Room Jointly Maintained because it is a religious organization can stand constitutional muster. The Airport acted in the belief that the provisions of the United States and California Constitutions affecting the establishment of religion required it to evict its longtime tenant. We conclude that the Airport was wrong in that belief and that its attempt to terminate the Reading Room's tenancy violated the Equal Protection

Clause of the United States Constitution. We also affirm certain post-judgment orders entered by the district court.

I. BACKGROUND

Since 1956 the Christian Science Reading Room Jointly Maintained has been a tenant in one of the terminal buildings at San Francisco International Airport which is operated by the appellants (collectively referred to as the Airport). In the space it rents, it has operated a reading room used for meditation and reading of Christian Science texts; reading materials are also offered for sale. Since 1976 the Reading Room has occupied the space under a rental permit.

On April 13, 1981, the Director of Airports sent a letter to the Reading Room stating that its "month-to-month tenancy must be terminated forthwith" because the Reading Room's "continued occupancy of Airport space [would be] contrary to provisions of the California Constitution." Attached to the letter was a supporting opinion of the Airports General Counsel that relied on article I, section 4 and article XVI, section 5 of the California Constitution, both of which prohibit state support of religion. (For purposes of convenience, we sometimes refer to both provisions collectively as the Establishment Clause of the California Constitution.) No further steps were taken at that time, however, and the Reading Room remained a tenant.

On January 10, 1984, the Director of Airports sent another letter to the Reading Room, stating that it was the Airport's current policy not to issue leases or permits for rental space to religious organizations. The Director stated further that "[t]his position is based in part on legal issues which were brought to our attention in 1981" by the Airports General Counsel. The Reading Room was directed to vacate its space permanently when renovation of the terminal building began.

On March 21, 1984, the Director of Airports sent a third letter to the Reading Room, in which he said that the renovation of the terminal building was underway and the time had come for the Reading Room to leave the premises. The requisite thirty-day notice to vacate was given, and the Reading Room was informed that the Airport would not rent it any other space.

On April 3, 1984, an attorney for the Reading Room appeared at a meeting of the Airports Commission and sought to have the Commission revoke the eviction letter. The Commission's concerns regarding the Establishment Clause of the First Amendment of the United States Constitution were discussed. Subsequently, the Reading Room's attorney supplied the Commission with a lengthy brief on the constitutional question. On April 17, the Airports Commission met again, and after further discussion of the requirements of the First Amendment, finally refused to revoke the eviction letter. The Commission also adopted a formal policy statement that the Airport would not rent space to religious organizations. The policy had apparently existed informally since 1981, or possibly even since 1977.

On April 19, the Reading Room filed in federal district court an application for a temporary restraining order and a complaint for a permanent injunction seeking to prohibit the Airport from evicting it. The temporary restraining order was granted on April 20. On May 8, after a trial, the district court granted a permanent injunction and entered judgment for the Reading Room. The permanent injunction declared that the eviction notice of March 21, 1984 was void, and ordered the Airport to allow the Reading Room to rent "comparable rental space and on comparable terms, conditions and covenants as existed at the time [the] action was commenced." Under the court's order, the Airport was permitted to terminate the Reading Room's tenancy at a later date as long as it was done for a "valid, nondiscriminatory reason."

As of May 16, 1984, the parties were unable to agree on what substitute space would be rented to the Reading Room, and the Airport sent it another thirty-day eviction notice. On June 6, the Airport filed an appeal from the permanent injunction and judgment. On June 18, the Reading Room had not vacated the premises and the Airport began an unlawful detainer action in the Superior Court of California, County of San Mateo. On June 19, the Reading Room requested that the district court stay the state court proceedings and hold the Airport in civil contempt. On June 21, a temporary restraining order was issued, barring the Airport from proceeding any further with the state court litigation.

On July 3, the district court stayed the state court litigation until otherwise ordered, and orally ordered the parties to cooperate and to negotiate the issue of what space could be rented. The Airport was further orally ordered to disclose all potential rental locations to the Reading Room.

On July 23, the district court again orally ordered the parties to negotiate and ordered the Reading Room to vacate the premises it was occupying. On July 30, the parties informed the court that a settlement had been reached. The Reading Room withdrew its contempt motion and the Airport stated that it would dismiss the state court action. The Airport agreed to rent space to the Reading Room, but both parties stipulated that the rental was made only "in accordance with [the district] court's orders." The district court orally approved this settlement.

On August 28, the Airport appealed from these post-judgment orders. On September 11, the district court entered a written order detailing and approving the settlement, and vacating the stay of the state court litigation. On September 17, the Airport amended its notice of appeal to make it clear that the Airport was appealing from the oral orders of July 3, 23, and 30, 1984, as embodied in the written order of September 11, 1984.

We review the district court's grant of injunctive relief for an abuse of discretion or for application of an erroneous legal standard. *S.E.C. v. Goldfield Deep Mines Co.*, 758 F.2d 459, 465 (9th Cir.1985). Questions of law, including those relating to the meaning of constitutional provisions, are considered *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, ____ U.S. ____, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). Findings of fact are reviewed under the "clearly erroneous" standard of review. *Id.* at 1200; Fed.R.Civ.P. 52(a). We may affirm a judgment on any basis supported by the record, even if the district court did not rely on that basis. *United States v. County of Humboldt*, 628 F.2d 549, 551 (9th Cir.1980).

II. EQUAL PROTECTION: THE RATIONAL RELATIONSHIP TEST

The district court ruled that religions *taken as a whole* constitute a suspect class and that, because the Airport presented no

compelling governmental interest in support of its new policy of refusing to rent to religious organizations, the policy violated the Equal Protection Clause of the Fourteenth Amendment. The district court applied the strict scrutiny test and enjoined the Airport from evicting the Reading Room pursuant to that policy. We reach the same result, but by applying a different level of scrutiny to the Airport's actions.

The Airport's policy divides the set of all current and prospective Airport tenants into two classes: religious organizations and all others. It seems clear that an individual religion meets the requirements for treatment as a suspect class. *See, e.g., New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976) (religion is an inherently suspect classification) (dicta); *De la Cruz v. Tormey,* 582 F.2d 45, 49 (9th Cir.1978) (religion is an "improper bas[is] for differentiation") (dicta), *cert. denied,* 441 U.S. 965, 99 S.Ct. 2416, 60 L.Ed.2d 1072 (1979); *see also City of Cleburne v. Cleburne Living Center,* 105 S.Ct. 3249, 3254-55 (1985) (describing test for determining whether a particular classification scheme creates a suspect class); *Plyler v. Doe,* 457 U.S. 202, 216 n. 14, 102 S.Ct. 2382, 2394 n. 14, 72 L.Ed.2d 786 (1982) (same). Whether all religions together constitute a suspect class for purposes of the Equal Protection Clause is a far more complex question that the courts have not previously addressed. We need not attempt to resolve that question here, however, because, as we conclude *infra,* the Airport's actions do not even meet the rational relationship test, the lower standard that applies when the class affected is *not* a suspect one.[1]

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[1] The Reading Room argues that the Free Exercise Clause of the First Amendment provides an alternative basis for applying strict scrutiny. Because we resolve this case in the Reading Room's favor under the rational relationship standard, we need not consider the Free Exercise Clause, either as a basis for applying strict scrutiny under the Equal Protection Clause or as an independent basis for invalidating the Airport's policy. For the same reason, we need not decide whether the policy of placing religious organizations in a separate category from all other entities would warrant application of the intermediate test set forth

Under the rational relationship test, a classification will be upheld if it rationally furthers a legitimate state purpose. *See Hooper v. Bernalillo County Assessor,* ____ U.S. ____, 105 S.Ct. 2862, 2866, 86 L.Ed.2d 487 (1985); *Zobel v. Williams,* 457 U.S. 55, 60 (1982). In determining whether the Airport's new policy meets that test, we must first determine the policy's purpose.

III. PURPOSE OF THE AIRPORT'S POLICY

The Airport has argued that there are three possible purposes for its policy of not renting to religious organizations: first, compliance with its obligations under the Establishment Clauses of the United States and California Constitutions; second, maximization of Airport revenue; third, serving the desires of the traveling public.

We are not bound by the purposes counsel advances when it is clear that they were not the actual purposes of the governmental policy. *See Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 & n. 16, 95 S.Ct. 1225, 1233 & n. 16, 43 L.Ed.2d 514 (1975). The district court found that the sole purpose of the Airport's policy of excluding religious organizations was to correct "violat[ions] [of] the Establishment Clause of the First Amendment to the Constitution." The record fully supports this conclusion, with only one exception. The district court erred to the extent that it found that only the United States Constitution, and not the California Constitution, was involved. The two other purposes advanced by counsel were patently make-weight. The letters of April 13, 1981, January 10, 1984, and March 21, 1984, as well as the discussions at the Airports Commission meetings of April 3 and 17, 1984, are dispositive in this regard. We do not suggest that revenue considerations could not constitute a legitimate basis for determining what entities are entitled to rent Airport space. We merely conclude that, here, it is evident that "maximizing revenue" was not the actual reason for the adoption of the new policy. In short, it is clear that the Airport believed that (1) the Establishment Clauses of both the United States and California Constitutions prohibited it from renting space to religious organizations and (2)

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in *Plyler v. Doe,* 457 U.S. 202, 217-18, 102 S.Ct. 2382, 2395, 72 L.Ed.2d 786 (1982).

it was required to adopt the new policy in order to remedy existing violations of those constitutions.

The purpose of remedying violations of the state and federal constitutions is clearly a legitimate one. Thus we must now determine whether the classification of prospective tenants into two groups, religious organizations and all others, rationally furthers that purpose.

IV. RATIONAL RELATIONSHIP OF AIRPORT'S CLASSIFICATION TO PURPOSE

In determining whether the classification rationally furthers the Airport's purpose of remedying constitutional violations, we must first examine the effect of the Establishment Clauses of the United States and California Constitutions on the Airport's right to rent space. Specifically, the question is: did the Airport's prior policy of renting space to religious groups and, particularly, its rental of space to the Reading Room, violate the provisions of either constitution? If not, there were no constitutional violations to remedy, and the classifications of religious and non-religious entities could not, under any state of facts, serve to further the objective of remedying such violations. *See United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-76, 101 S.Ct. 453, 459-60, 66 L.Ed.2d 368 (1980) (setting forth applicable test).

A. *The United States Constitution*

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion." This provision is made applicable to the states through the Fourteenth Amendment. *Wallace v. Jaffree*, ___ U.S. ___, 105 S.Ct. 2479, 2486-89, 86 L.Ed.2d 29 (1985). The Supreme Court has established a three-part test to determine whether governmental action is in compliance with the Establishment Clause. First, the action must have a secular governmental purpose. Second, the principal or primary effect of the action must be one that neither advances nor inhibits religion. Third, the action must not foster an excessive entanglement with religion. *Witters v. Washington Department of Services for the Blind*, ___ U.S. ___, 106 S.Ct. 748, 751, 88 L.Ed.2d 846

(1986) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971)); *School District of Grand Rapids v. Ball*, ___ U.S. ___, 105 S.Ct. 3216, 3222, 87 L.Ed.2d 267 (1985); *Wallace*, 105 S.Ct. at 2489-90; *Estate of Thornton v. Caldor, Inc.*, ___ U.S. ___, 105 S.Ct. 2914, 2917, 86 L.Ed.2d 557 (1985).

It appears that the purpose of the Airport's prior policy allowing religious groups to rent space was purely secular: to obtain revenue. The Reading Room's rental permit agreement was the standard form agreement that the Airport used for all tenants that rented under a permit. The rent the Reading Room paid was determined by a rent schedule that applied to all such tenants. Given the arm's-length nature of the commercial real estate transaction, and the absence of any evidence suggesting that the Airport was motivated by any other considerations, it is simply not possible to say that the Airport's "actual purpose" was to advance religion in general or the Christian Science religion in particular. *See Wallace*, 105 S.Ct. at 2490.

Nor can we say that the effect of the Airport's prior policy was to advance religion. It is, of course, obvious that the Christian Science Reading Room does receive some benefit from being allowed to rent space at the Airport. The Supreme Court has held however that the benefits to religion are improper only if they are other than "incidental." *Widmar v. Vincent*, 454 U.S. 263, 273-74, 102 S.Ct. 269, 276-77, 70 L.Ed.2d 440 (1981). Two factors have been held to be particularly relevant in determining whether benefits received are incidental: first, there must not be "any imprimatur of state approval on religious sects or practices," and second, the benefits must be generally available to others besides religious groups. *Id.* at 274, 102 S.Ct. at 276-77.

In this case, there is nothing to suggest that the Airport endorsed the religious views and beliefs of the Reading Room or gave favored status to religion in general. First, the San Francisco airport, like other airports, but unlike most other government buildings, is a facility in which commercial space has traditionally been available to those who wish to rent it. In many respects, it operates in a manner similar to that of a shopping mall. An airport does not symbolize or represent governmental authority in

the minds of most citizens in the way that a city hall does, or a courthouse, or the Treasury, Defense, or Agriculture Departments. Moreover, there is no suggestion that all religions did not have the same opportunity to rent space, or that groups with views opposed to organized religion, or with any other social or philosophical view, were denied that opportunity. If the Airport endorsed the tenets of Christian Science by renting space to the Reading Room, then it could as easily be argued that it is endorsing the business and labor practices of domestic airlines, the politics and policies of the foreign governments that own airlines, the consumption of alcohol and sourdough bread, and the reading of Penthouse magazine. Clearly, it does none of these. Second, the benefits of rental space at the Airport are generally available to all who wish to hawk their wares. The Airport is filled with restaurants, newsstands, florists, candy shops, gift shops, book stores, barbers, and duty free shops; it is not filled principally with religious organizations. *See Widmar*, 454 U.S. at 275, 102 S.Ct. at 277. Thus, we conclude that the prior policy of allowing religious organizations to rent Airport space did not improperly benefit, or advance, religion.

The final prong of the *Lemon* test deals with governmental entanglement with religion. In *Lemon*, the Supreme Court noted that the entanglement test was directed at "programs, whose very nature is apt to entangle the state in details of administration." *Lemon*, 403 U.S. at 615, 91 S.Ct. at 2112 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 695, 90 S.Ct. 1409, 1425, 25 L.Ed.2d 697 (1970)). In this case, the Reading Room did not tell the Airport how to run its business, and the Airport did not tell the Reading Room how to run its operations. In fact, the Airport seems to have been significantly less involved in the operation of the Reading Room than is the case with respect to other tenants. In many instances, the Airport told its tenants what items of merchandise they were required to sell; the Airport never attempted, however, to prescribe the reading material to be maintained in the Reading Room.[2]

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[2] The Airport attempts to argue that we must consider the issue of political entanglement as well as that of administrative entanglement. The claim of political entanglement is based on two newspaper articles

We conclude then that the Airport's policy of renting space to religious organizations meets all three of the *Lemon* criteria. Our conclusion is based on the particular facts of this case. We need not consider what the result might be if the Reading Room had been renting space in a more traditional government building, or in any other area that by its nature might suggest that the government endorsed the religious organization. We hold only that the Reading Room's rental of space at the Airport does not violate the Establishment Clause of the United States Constitution.

B. *The California Constitution*

Article I, section 4 of the California Constitution provides that: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion." The courts of California have suggested that article I, section 4 is broader than the Establishment Clause of the First Amendment because of the additional language regarding "preference." *See Fox v. City of Los Angeles,* 22 Cal.3d 792, 796, 150 Cal.Rptr. 867, 869, 587 P.2d 663, 665 (1978); *Feminist Women's Health Center v. Philibosian,* 157 Cal.App.3d 1076, 1092, 203 Cal.Rptr. 918, 926 (1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1752, 84 L.Ed.2d 816 (1985). It is irrelevant for our purposes whether this is so. We have already demonstrated above that the Airport's prior policy did not favor or prefer any individual religion, or religion as a whole. Accordingly that policy was not violative of article I, section 4 of the California Constitution.

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which appeared in April 1984 and which took opposite positions as to whether the Reading Room should be evicted. We note that there was no controversy during the period when the Airport had a policy of renting to religious organizations; the controversy arose well after the Airport changed to a policy of exclusion. Thus, the record contains no facts which support a claim that the prior policy of renting to religious organizations caused any political entanglement.

The Airport also relies on Article XVI, section 5 of the California Constitution.[3] That provision has been interpreted to "ban[ ] any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes." *California Teachers Association v. Riles,* 29 Cal.3d 794, 806, 176 Cal.Rptr. 300, 307, 632 P.2d 953, 960 (1981) (quoting *California Educational Facilities Authority v. Priest,* 12 Cal.3d 593, 605 n. 12, 116 Cal.Rptr. 361, 369 n. 12, 526 P.2d 513, 521 n. 12 (1974)). The clause, however, "does not prohibit a religious institution from receiving an indirect, remote or incidental benefit from a [policy] which has a secular primary purpose." *Riles,* 29 Cal.3d at 806, 176 Cal.Rptr. at 307, 632 P.2d at 960. As explained above, the Reading Room received only an indirect or incidental benefit from the Airport's rental policy, and the policy had a solely secular purpose. Furthermore, the Attorney General of California has held that it is proper under article XVI, section 5 for an airport to lease space in one of its buildings to a religious organization as long as the rental transaction is at arm's length. 25 Cal.Op. Att'y Gen. 309 (1955). Thus, we conclude that the Airport's policy of allowing religious organizations to rent space at the Airport did not violate article XVI, section 5 of the California Constitution.

C. *The Rational Relationship Test Applied*

The purpose of the Airport's new policy was to remedy violations of certain provisions of the United States and California Constitutions and to bring its rental rules into compliance with those provisions. However, as we have just explained, the Air-

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[3] Article XVI, section 5 provides in part that: Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever.

port's prior policy, including its rental of space to the Reading Room, already fully complied with the applicable provisions of both federal and state constitutions and there were no violations to remedy. Thus, the new policy that the Airport adopted did absolutely nothing to advance the Airport's purpose. A fortiori, the classification of tenants into two groups, religious organizations and all others, did not rationally further that purpose. We must conclude, therefore, that the new policy fails the rational relationship test and violates the Equal Protection Clause of the Fourteenth Amendment. The Reading Room cannot be evicted pursuant to that policy.

We do not decide whether a policy barring rental of airport space to religious groups could be adopted for other reasons. We do not even preclude the possibility that such a policy might under some circumstances, constitute a legitimate way of ensuring compliance with the United States and California Constitutions. We hold only that where the Airport adopted its new policy in order to remedy violations of the United States and California constitutions that it thought existed, but in fact there were no violations to be remedied, it cannot be said that the policy (or its classifications) furthers the governmental purpose in any way. While our decision is necessarily a narrow one, we believe the distinctions we have drawn to be of considerable significance. Based on the record before us, it is far from clear that the Airport would have adopted its new policy but for its mistaken view that it was compelled by law to do so. We have no way of knowing what policy the Airport would have adopted had it had a proper understanding of the meaning and effect of the constitutional provisions. Unless and until the Airport again decides to adopt a specific policy regarding the rental of space to religious organizations, it will not be possible for a court to determine whether the Airport actually desires to ban rentals to such organizations, and, if so, whether a constitutionally valid reason for doing so exists. In the meantime, the prior policy of treating religious organizations like all others must remain in effect.

V. POST-JUDGMENT ORDERS

The Airport argues that, because it had previously filed a notice of appeal, there was no jurisdiction in the district court to enter the orders of July 2, 23, and 30, 1984 and September 11, 1984.

The order of July 2, which directed a stay of the state court litigation, was vacated on September 11. The Airport is therefore, not aggrieved by the order of July 2, and under elementary rules of appellate procedure has no standing to appeal from that order. *See, e.g., Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 333, 100 S.Ct. 1166, 1171, 63 L.Ed.2d 427 (1980).

The orders of July 2 and 23 directing the parties to cooperate and negotiate, and the Airport to show all available rental space, have been fully complied with, and it is clearly impossible to undo the effects of that compliance. The appeal from those orders is therefore moot and cannot now be decided by this court. *See Honig v. Students of the California School for the Blind,* ___U.S. ___, 105 S.Ct. 1820, 85 L.Ed.2d 114 (1985) (per curiam); *University of Texas v. Camenisch,* 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981); *Western Addition Community Organization v. Alioto,* 514 F.2d 542 (9th Cir.), *cert. denied,* 423 U.S. 1014, 96 S.Ct. 446, 46 L.Ed.2d 385 (1975); 13A C.A. Wright, A.R. Miller, & E.H. Cooper, *Federal Practice & Procedure* § 3533.2 (2d ed. 1984).

We are left then, with the oral order of July 30 and the written order of September 11, both of which approved the settlement between the parties and, pursuant to the settlement, directed the Airport to issue a rental permit to the Reading Room. The normal rule is that a party cannot appeal from an order which it consented to have entered against it. *See, e.g.,* 15 C.A. Wright, A.R. Miller, & E.H. Cooper, *Federal Practice & Procedure* § 3902 at 408 (1976 & Supp.1985); 9 *Moore's Federal Practice* § 203.06 at 3-27 (1985). There is an exception to this rule, however, when it is clear that a party intended to preserve its right of appeal. *See, e.g., Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.,* 414 F.2d 750, 752 (9th Cir. 1969); 15 Wright, Miller & Cooper, *supra,* § 3902 at n. 26 (Supp.1985). On the record of this case it is clear that the Airport intended to preserve its right to appeal.

Rule 62(c) of the Federal Rules of Civil Procedure provides that "[w]hen an appeal is taken from [a] . . . final judgment granting . . . an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal." This rule codifies the inherent power of a court "to preserve the status quo where, in its sound discretion, the court deems the circumstances so justify," and specifically authorizes the district court to modify, if necessary, the terms of the injunction being appealed from. *McClatchy Newspaper v. Central Valley Typographical Union No. 46,* 686 F.2d 731, 734-35 (9th Cir.), *cert. denied,* 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982) (quoting 7 *Moore's Federal Practice* § 62.05 at 62-19). In light of the progress of the renovation work which necessitated the Reading Room's vacation of the space it then occupied, and the difficulty the parties were having in locating new but comparable space for the Reading Room, we cannot say that the district court abused its discretion by directing the issuance of a rental permit for substitute space in order to preserve the status quo and ensure the efficacy of the eventual decision of the court.

CONCLUSION

We hold that the Airport's new policy of refusing to rent to a particular class of tenants, religious organizations, does not rationally further the purpose for which it was adopted, and thus violates the Equal Protection Clause. We also hold that the district court did not abuse its discretion in entering the post-judgment orders. Accordingly, we affirm the judgment and orders of the district court.

AFFIRMED.

Appendix D

United States District Court
Northern District of California

No. C 84-2087 SC

Christian Science Reading Room
Jointly Maintained and David M. Sacks,
Plaintiffs,

v.

City and County of San Francisco, et al.,
Defendants.

[Filed May 8, 1984]

JUDGMENT

The above-entitled action came on for trial on April 27, 1984, pursuant to the court's April 20, 1984, order pursuant to Federal Rule of Civil Procedure 65(a)(2) that the hearing on plaintiff's motion for a preliminary injunction be consolidated with the trial on the merits. Plaintiffs and defendants were represented by counsel and were given a full opportunity to argue the issues herein.

The court having considered the evidence and arguments made by counsel for the parties, and having made its findings of fact and conclusions of law herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, in accordance with the Order Granting Permanent Injunction herein, that:

1. The defendants' eviction of plaintiff Christian Science Reading Room Jointly Maintained ("Reading Room"), based on the Reading Room's religious character and activities, violates plaintiffs' rights to freedom of religion and the equal protection of the laws guaranteed by the First and Fourteenth Amendments to the United States Constitution.

2. The court hereby declares that:

a. Defendants are not barred by the United States Constitution or law from continuing to have a commercial, non-discriminatory landlord-tenant relationship with the Reading Room, and, specifically, that such a relationship does not constitute an establishment of or preference for religion.

b. Defendants may not evict the Reading Room or refuse relocation to the Reading Room or in any other way treat the Reading Room differently from other, similarly situated tenants of the San Francisco International Airport on the basis, in whole or in part, of the religious affiliation, religious activities or religious beliefs of the Reading Room.

c. The eviction notice given to the Reading Room by the Airports Commission on March 21, 1984, is null and void.

3. Plaintiffs are entitled to permanent injunctive relief.

4. The court hereby orders a permanent injunction in this action, restraining defendants from interfering with the exercise of plaintiffs' free exercise of religion, restraining defendants from subjecting the Reading Room to any different treatment from that accorded other, similarly situated tenants at the airport on the basis of plaintiffs' religious beliefs, affiliations, activities or expression, and restraining defendants from evicting or refusing to relocate the Reading Room based on plaintiffs' religious affiliations, activities, beliefs or expression.

5. Plaintiffs' costs shall be taxed to defendants.

6. The court retains jurisdiction so that any of the parties may apply for appropriate relief or to enforce this judgment or the accompanying Order Granting Permanent Injunction.

Dated: May 8, 1984

/s/ SAMUEL CONTI
United States District Judge

Appendix E

United States District Court
Northern District of California

No. C 84-2087 SC

Christian Science Reading Room Jointly Maintained
and David M. Sacks,
Plaintiffs,

v.

City and County of San Francisco, et al.,
Defendants.

[Filed May 8, 1984]

ORDER GRANTING PERMANENT INJUNCTION

This matter is before the court on plaintiffs' complaint for a permanent injunction restraining defendants from evicting plaintiff Christian Science Reading Room Jointly Maintained (hereafter "plaintiff" or "Reading Room") from the San Francisco International Airport.

This action arises out of the following background. Plaintiff has, since 1956, been a tenant in the South Terminal of the San Francisco International Airport. Plaintiff operates a reading room occupying approximately 455 square feet of space. The reading room provides a place for meditation and reading of Christian Science texts, and offers some materials for sale.

From 1956 to 1975, plaintiff occupied the space pursuant to a lease. In 1976, plaintiff's status was changed to that of a month-to-month tenant pursuant to a permit. This change in status was made, at least in part, because the airport expected to undertake extensive remodeling and reconstruction and wished to allow flexibility in relocating tenants. From 1976 to 1981, airport personnel informed plaintiff that it would be offered relocation if and when the airport required plaintiff's space for reconstruction purposes. In 1981, airport personnel told plaintiff that it would not be offered relocation and that its tenancy would be terminated. The only reason given was that the airport commission was concerned that renting to plaintiff, a religious organization, would

present Establishment Clause problems. In early April, 1984, the airport commission adopted a resolution that the airport would no longer rent space for the conduct of any religious activities. On March 21, 1984, the airport served an eviction notice on plaintiff requiring plaintiff to vacate its premises by April 21, 1984.

Plaintiff has brought this action seeking a permanent injunction restraining defendants from evicting plaintiff on the ground that plaintiff is a religious organization. Plaintiff argues, among other things, that eviction based solely on the fact that plaintiff is a member of the class of "religious organizations" is discriminatory and in violation of the equal protection clause of the Fourteenth Amendment to the Constitution.[1]

The court makes the following findings of fact:

1. Plaintiff Reading Room is a nonprofit religious corporation organized under the laws of the State of California, with its principal place of business at San Francisco International Airport in San Mateo County, California. The Reading Room has for 27 years rented space at the San Francisco International Airport (airport). Its current rental space occupies approximately 455 square feet in the South Terminal.

2. Plaintiff David M. Sacks is an adherent of the Christian Science faith, who has in the past availed himself of the services of the Reading Room at its rental facility at the airport, and who intends to do so in the future.

3. Defendant City and County of San Francisco is a political subdivision of the State of California and a municipal corporation, which operates and administers the San Francisco International Airport through defendant Airports Commission (Commission), a commission of the City and County of San Francisco established by the San Francisco City Charter.

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[1] The defendants are officers and subdivisions of the State of California. Consequently, their administrative actions are governed by the Fourteenth Amendment to the United States Constitution. *See Lynch v. Donnelly*, ___ U.S. ___, 79 L. Ed. 2d 604, 609 (1984); *Yick Wo. v. Hopkins*, 118 U.S. 356, 371-75 (1885); *Jackson v. Marine Exploration Co., Inc.*, 583 F.2d 1336, 1347 (5th Cir. 1978).

4. Defendants Bernstein, Fleishell, Kadish, Goosby and Coblentz are all members and commissioners of the Commission.

5. Defendant Turpen is Director of Airports for the City and County of San Francisco.

6. Defendant Airports Commission has the legal responsibility and authority to operate and administer the airport, to rent out space at the airport to private tenants and lessees, and to develop rules, regulations and policies governing the rental of space to private tenants and lessees at the airport. In performing all of the acts referred to below, each defendant acted in his, her or its official capacity, and within the scope of his, her or its authority, and under color of law.

7. In 1956 the Christian Science Reading Room applied to the airport management to rent space at the airport for a reading room. The application was granted, and the Reading Room became a tenant of the Commission in that year.

8. The Reading Room opened its doors to the public on January 1, 1957, and since that time has always occupied rental space at the airport. The Reading Room has at all times relevant paid rent for the premises occupied, at a rate determined by the Commission. The Reading Room has never received any preference, in either the amount of rent or the other terms of tenancy, over other similarly situated airport tenants. The Reading Room's present rental was determined by the Commission pursuant to the Commission's standard rental rate schedule.

9. The space rented by the Reading Room at the airport is used by the Reading Room, adherents of the Christian Science faith including plaintiff Sacks, and members of the public for prayer and quiet contemplation, for Bible and religious study, for reading the Daily newpaper The Christian Science Monitor, for communication of Christian Science religious ideas and beliefs and for sale and distribution of Christian Science publications. The Reading Room is open to all persons, 365 days a year.

10. The relationship between the Commission and the Reading Room is a commercial, arms-length relationship. The Commission does not make any monetary contribution to the Reading

Room nor has it ever granted any subsidy to the Reading Room. All utilities are paid directly, as part of the rental agreement with the Commission, on the same basis as other airport tenants, and the Commission has never offered or provided services to the Reading Room except on the same commercial basis that it has offered or provided such services to its other similarly situated tenants.

11. The Commission plays no role, directly or indirectly, in determining the form or the content of the expressive and religious activities that take place in the Reading Room. The Commission does not administer or operate, or participate in administering or operating, the Reading Room; neither does the Commission select, promote, prepare or otherwise have any involvement with the religious materials, programs, or activities that are used, distributed, communicated or promoted at the Reading Room. The Commission plays no role in the selection of personnel or policies of the Reading Room.

12. The Reading Room plays no role whatever in the administration, operation or direction of the airport, and no officer or employee of the Reading Room or member of its Board of Directors is an officer, administrative employee or commissioner of the Commission.

13. Up to February 1, 1975, the Reading Room rented space on the basis of a lease agreement. However, when that lease expired the Commission informed the Reading Room that it could not immediately obtain a renewal of its lease because it was likely that future renovation work would require relocation of the Reading Room and, therefore, until such time as the Reading Room's "permanent" location was known, the Reading Room would be placed on a month-to-month tenancy on the basis of a permit.

14. In a letter dated April 13, 1981, then-Director of Airports Richard Heath, acting within the scope of his authority and under color of law, informed the Reading Room that it would not be relocated as part of the renovation of the airport, and that its tenancy would have to be terminated because of the Reading Room's religious affiliation.

15. Along with Mr. Heath's April 13, 1981, letter, defendants on that same date sent to the Reading Room a copy of a memorandum by City Attorney Donald J. Garibaldi, stating the Commission's view that it could not rent to the Reading Room in the future because of the Reading Room's religious affiliation.

16. On February 17, 1983, at a meeting of all tenants called by Marcel E. Conrad, as property manager of the airport, Mr. Conrad, acting in his official capacity, stated that the phased redevelopment of the South Terminal, scheduled to begin in mid-1983, would require the relocation of some tenants, but that the airport would dovetail all existing tenants by relocation into new redesigned areas.

17. On or about January 10, 1984, defendant Turpen, acting in his official capacity and within the scope of his authority and under color of law, wrote to the Reading Room, stating that the Commission would no longer issue leases and permits for any religious activity at the airport, and therefore that the Commission would not relocate the Reading Room as part of the renovation of the airport.

18. On March 21, 1984, the Commission served an eviction notice on the Reading Room, purporting to require it to vacate its rental space by April 21, 1984. That letter incorporated by reference the reasons stated by Mr. Turpen in his letter of January 10, 1984, as the Commission's reasons for terminating the occupancy of the Reading Room.

19. On April 3 and 17, 1984, at official public meetings of the Commission, the commissioners considered the administrative appeal of the Reading Room which sought a reversal of the eviction and to obtain relocation. The Commission, at its April 17, 1984, meeting, rejected the administrative appeal, adopting instead the following resolution:

Policy—Religious Activities

Resolution declaring that it is the policy of the Airports Commission not to provide space at San Francisco International Airport for the conduct of religious activities, except as

specified by its Rules and Regulations relating to First Amendment activities.

20. Apart from the Reading Room, no tenant of the airport's South Terminal has had its occupancy terminated without either some offer of relocation to another terminal or some consideration for the abandonment of relocation rights.

21. All or virtually all tenants of the South Terminal similarly situated to the Reading Room have been offered relocation as part of the renovation process at the airport, but the Reading Room has not been offered relocation.

22. Apart from the Reading Room, pre-renovation tenants and lease holders in the South Terminal have been offered a preference in relocation over potential new tenants of the Central and South Terminals.

23. The Commission's basis and reason for evicting the Reading Room was the fact that the Reading Room is a religious organization.

24. The sole reason supported by the record for the Commission's decision to exclude religious organizations from tenancy at the airport was the Commission's concern that permitting such tenancy would violate the Establishment Clause of the First Amendment to the Constitution.

25. At all relevant times, the Reading Room has been considered by the Commission to be a good tenant.

26. The Reading Room has never been asked to participate in competitive bidding against other potential tenants for a relocation site, and failure to participate in competitive bidding is not the basis of the eviction notice to the Reading Room.

27. In October 1982 the Commission announced a reduction in the rental rates for terminal space rented to airline and non-airline tenants in categories I-IV. The Reading Room has paid rent at all times according to the Commission's rental rate structure. The Reading Room has never been told that it would not be relocated because it paid insufficient rent nor was the Reading Room asked to pay a higher rent.

28. Defendants did not evict the Reading Room because of lack of space.

29. Defendants did not evict the Reading Room in order to maximize rental income to the airport.

30. Defendants did not evict the Reading Room on the basis of passenger survey results.

31. Defendants did not evict the Reading Room on the ground that the Reading Room has a permit and not a lease.

32. Alternative space exists at the airport for relocation of the Reading Room if that space is allocated on a non-religious basis and if the Reading Room is treated the same as other similarly situated tenants at the airport.

OPINION OF THE COURT, FURTHER FINDINGS AND CONCLUSIONS OF LAW:

The court has jurisdiction over this action pursuant to Title 28 U.S.C. § 1343 and principles of pendent jurisdiction.

Defendants argue that they may terminate plaintiff's tenancy based solely on the fact that plaintiff is a religious organization. Defendants contend that their concern about possible Establishment Clause problems is a sufficient basis for their new policy not to rent to *any* religious organization, including plaintiff, and that carrying out this policy does not violate the Constitution.

The first step in ascertaining whether the defendants have violated the equal protection clause of the Fourteenth Amendment is to determine whether discrimination has, in fact, occurred. The test is generally whether persons similarly situated have been treated disparately. *See Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 37 (1927); *Barbier v. Connolly,* 113 U.S. 27, 31-32 (1884); *Camacho v. Bowling,* 562 F. Supp. 1012, 1026 (N.D. Ill. 1983).

In this case, defendants have treated plaintiff, a commercial tenant, differently from all other similarly situated commercial tenants at the airport. All other similarly situated tenants have been offered relocation or have been given the opportunity to

negotiate with the airport for alternative space or alternative terms. *See* Declarations of Levine, Nelson, Stanwood, Berger and Conrad. Consequently, it is clear that defendants have discriminated against plaintiff by evicting plaintiff from its tenancy at the airport.

The second step in the court's analysis of a possible equal protection clause violation is to determine whether the discriminatory classification is justifiable. If the discrimination relates only to economic or social situations, the discrimination is generally permissible if the state has a rational basis for such discrimination. *See Exxon Corp. v. Eagerton,* ____ U.S. ____, 103 S. Ct. 2296, 76 L. Ed. 2d 497, 513 (1983). If the discrimination is based on a suspect classification or if it will burden a fundamental right, discrimination is not permissible unless a compelling state interest necessitates such discrimination. *See New Orleans v. Dukes,* 427 U.S. 297, 303 (1976); *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969), and cases cited therein. In order to determine whether defendants' discrimination against plaintiff is justifiable, therefore, the court must first determine which test (rational basis or strict scrutiny) is applicable. *See Dunn v. Blumstein,* 405 U.S. 330, 335 (1972).

The court finds that defendant's categorization of tenants as "religious organizations" or "non-religious organizations" for purposes of determining eligibility for tenancy at the airport is a suspect classification. Classification based solely on religion, whether directed against an individual or an organization, is inherently suspect.[2] *C.f., New Orleans v. Dukes,* 427 U.S. 297, 303 (1976); *Kedroff v. Saint Nicholas Cathedral,* 344 U.S. 94 (1952); *De La Cruz v. Tormey,* 582 F.2d 45, 49 (9th Cir. 1978);

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[2] Under California law, the prohibition against private discrimination in business establishments based on a person's religion is statutory. Cal. Civ. Code §§ 51, 53(b). The term "person" would include plaintiff herein. Cal. Civ. Code § 51.5. The California court has interpreted these provisions to extend to rental situations. *See Swann v. Burkett,* 209 Cal. App. 3d 685 (1962). Although these statutes are aimed at private discrimination, at least one decision indicates that these same restrictions apply to discrimination through state action. *Reitman v. Mulkey,* 387 U.S. 369, 374 (1967).

United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). In addition, the court finds that defendants' actions burden plaintiffs' fundamental right to freedom of religion guaranteed by the First and Fourteenth Amendments to the Constitution. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1939); *Callahan v. Woods*, ____ F.2d ____ (Civil No. 83-1688) (9th Cir. March 30, 1984).

Because defendants' action in evicting plaintiff on the ground that plaintiff is a religious organization is based on a suspect classification and because it burdens a fundamental right, defendants' action is subject to strict judicial scrutiny. *See New Orleans v. Dukes*, 427 U.S. 297 (1976); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Graham v. Richardson*, 403 U.S. 365 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Callahan v. Woods*, ____ F.2d ____ (Civ. No. 83-1688) (9th Cir. March 30, 1984); *Pappanastos v. Board of Trustees*, 615 F.2d 219 (5th Cir. 1980). Under this strict standard, defendants must show that a compelling state interest necessitates the classification based on religion in order to justify such discriminatory classification. *See* cases cited above.

Defendants have evicted plaintiff solely on the ground that it is a religious organization.[3] The only reason defendants have given for excluding religious organizations, as a class, from tenancy at the airport is the defendants' concern that renting to religious organizations would violate the Establishment Clause of the First Amendment to the Constitution. *See* Sacks Declaration.

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[3] *See* Sacks Declaration. Although defendants' counsel advanced other reasons at trial, such as a need to maximize rental income and to be responsive to passenger needs, the only reason advanced prior to the filing of this action which is substantiated by the record is plaintiff's status as a religious organization. *See* Declaration of Sacks and Levine. Even if defendants had legitimate reasons for evicting plaintiff, if one reason for evicting plaintiff was an impermissible one such impermissible reason renders defendants' action a violation of the equal protection clause. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977).

Contrary to defendants' arguments, the court finds that defendants may constitutionally rent to plaintiff, a religious organization, without violating the Establishment Clause.[4] As the Supreme Court has stated, "the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility to any." *Lynch v. Donnelly*, ____ U.S. ____, 79 L. Ed. 2d 604, 610 (1984). *See also Zorach v. Clauson*, 343 U.S. 306, 312-14 (1952). Under the circumstances of this case, defendants would merely be accommodating, not establishing, plaintiff's religion by allowing plaintiff tenancy at the airport.

The usual test for determining whether state interaction with religion violates the Establishment Clause is the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This test requires the court to determine whether the "challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion." *Lynch v. Donnelly*, 79 L. Ed. 2d at 613. *See Lemon v. Kurtzman*, 403 U.S. at 612-13.

It is clear that the purpose of renting space to plaintiff is secular. There is nothing in the record to indicate that defendants' purposes in renting to plaintiff were any different than their purposes in renting to any other commercial tenant. These purposes were to generate rental income and to accommodate passenger needs. *See* Martin Declaration. These purposes are proper, secular purposes and do not indicate that renting to plaintiff would violate the Establishment Clause. *See, e.g., Brashich v. Port Authority of New York and New Jersey*, 484 F. Supp. 697, 703 (S.D.N.Y. 1979), *aff'd*, 628 F.2d 1344 (2d Cir. 1980).

The determination of whether renting to plaintiff has the "primary effect" of establishing a religion is more difficult. As the

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[4] The Establishment Clause of the First Amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion." This provision is binding on the states, and hence on defendants herein, through the Fourteenth Amendment. *See Lynch v. Donnelly*, ____ U.S. ____, 79 L. Ed. 2d 604, 609 (1984).

Supreme Court has stated, this determination is often "elusive and difficult to make." *Lynch v. Donnelly,* 79 L. Ed. 2d at 615. For this court to hold the benefit conferred on plaintiff herein impermissible, however, the court would have to conclude that the benefit conferred exceeds that conferred by expending public money for textbooks in or transportation to church-sponsored schools, federal grants to church-related colleges, or tax exemptions for church property. *See Lynch v. Donnelly,* 79 L. Ed. 2d at 615-16. None of these activities have been held to violate the Establishment Clause. *See Roemer v. Board of Public Works,* 426 U.S. 736 (1976); *Tilton v. Richardson,* 403 U.S. 672 (1971); *Walz v. Tax Commission,* 397 U.S. 664 (1971); *Board of Education v. Allen,* 392 U.S. 236 (1968); *Everson v. Board of Education,* 330 U.S. 1 (1947). The court does not think the benefit conferred on plaintiff herein exceeds that held permissible in the above cases.

Accordingly, the court finds that, under the circumstances of this case, the "primary effect" of permitting plaintiff a tenancy at the airport is not to impermissibly advance religion. Although plaintiff certainly derives some benefit to its religious teachings from occupying space at the airport, this benefit is incidental. Such incidental benefit does not violate the Establishment Clause. *See Lynch v. Donnelly,* 79 L. Ed. 2d at 616; *Widmar v. Vincent,* 454 U.S. 263, 273-74 (1981); *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756 (1973). There is no indication in the record that any user of the airport is misled to believe that the airport sponsors or supports plaintiff's religious teachings.[5] Accordingly, the court finds that the primary effect of plaintiff's tenancy at the airport is not to impermissibly advance religion, but merely to accommodate it.

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[5] At oral argument at trial, plaintiff offered to post a notice in the reading room expressly stating that the airport does not support or endorse plaintiff's religious views. If defendants are concerned with the possibility of the airport being perceived to endorse plaintiff, such a notice should meet that concern. *See Widmar v. Vincent,* 454 U.S. at 274 n.14.

The court now turns to the third prong of the *Lemon* test. It is clear on the facts of this case that plaintiff's tenancy does not cause an "excessive entanglement" of government with religion. The facts in this case show that defendants are no more involved in plaintiff's operations than they are with those of their other commercial tenants. The airport derives rent, pursuant to the airport's set schedules, from plaintiff. Plaintiff pays its own costs of remodeling, maintaining and operating the reading room. Airport personnel are in no way involved with the form or content of plaintiff's religious materials, programs or activities. *See* Stanwood Declaration at ¶¶ 5, 10, 11; Mugg Declaration ¶¶ 8, 12. There is no indication in the record that defendants' relationship with plaintiff is other than a purely commercial one. Accordingly, there is no excessive entanglement of government with religion caused by plaintiff's tenancy at the airport.

Applying the *Lemon* test, therefore, the court finds that defendants would not violate the Establishment Clause by renting space, under the circumstances of this case, to plaintiff. *See also Brashich v. Port Authority of New York and New Jersey*, 484 F. Supp. 697 (S.D.N.Y. 1979), *aff'd*, 628 F.2d 1344 (2d Cir. 1980).

The record shows that the only reason defendants have given for excluding religious organizations, as a class, from tenancy at the airport is defendants' concern that permitting such tenancy would violate the Establishment Clause. As the court has stated, renting to plaintiff herein would not violate the Establishment Clause. Because the only reason given for defendants' discriminatory classification is not valid, it cannot amount to a compelling state interest.[6] *See Widmar v. Vincent*, 454 U.S. at 276; *In re Griffiths*, 413 U.S. 717, 721-23 (1973). Accordingly, the court finds that defendants have not met their burden of establishing that a compelling state interest necessitates excluding the class of religious organizations from tenancy at the airport.

In accordance with the foregoing analysis, the court finds that defendants may not constitutionally terminate plaintiff's tenancy

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[6] Of course, if defendants' conduct would violate the Establishment Clause, defendants' concern to avoid such violation would be a compelling state interest. *See Widmar v. Vincent*, 454 U.S. at 271.

on the ground that plaintiff is a religious organization. Terminating plaintiff for that reason violates the equal protection clause of the Fourteenth Amendment to the Constitution.

Nothing in this opinion, however, should be read to preclude defendants from terminating plaintiff's tenancy for other, constitutional, reasons. Plaintiff is a month-to-month tenant at the airport with no vested right to occupy rental space. Consequently, defendants are in no way prohibited from terminating plaintiff for valid commercial or other reasons, unless those other grounds are merely a pretext or sham for discrimination.

Under this decision, defendants are only precluded from terminating plaintiff's tenancy on the constitutionally impermissible ground that plaintiff is a religious organization.

In accordance with the foregoing, it is hereby ordered that defendants' March 21, 1984, notice of eviction to plaintiff is void. Defendants are ordered to maintain plaintiff as a tenant at the airport in comparable rental space and on comparable terms, conditions and covenants as existed at the time this action was commenced. The requirement that plaintiff be maintained in "comparable" space does not require defendants to maintain plaintiff in its present location or to relocate plaintiff to space of exactly the same size as that plaintiff currently occupies. This decision does not require defendant to accord plaintiff preferential treatment. Thus, if defendants modify the rent or other terms applicable to tenants similarly situated to plaintiff, defendants may also modify plaintiff's tenancy so long as such modification is not made in a discriminatory or retaliatory manner. As noted above, this decision does not preclude defendants from terminating plaintiff's tenancy, at some later time, for valid, nondiscriminatory reasons. This order does require defendants to presently maintain plaintiff as a tenant at the airport under conditions which, under the cirumstances of relocation and reconstruction, are comparable to those existing at the time this action was commenced.

Plaintiffs' request for a permanent injunction is hereby granted, subject to the provisions of the within order.

The Temporary Restraining Order presently in existence is hereby vacated.

Dated: May 8, 1984.

/s/ Samuel Conti
United States District Judge

Appendix F

Excerpts from the San Francisco Charter

PART TWENTY: AIRPORTS COMMISSION

3.690 Commission; Composition

An airports commission is hereby created, which shall consist of five members, who shall be appointed by the mayor and who shall be subject to recall and to suspension and removal in the same manner as elective officers. The term of each commissioner shall be four years, provided that the first five commissioners to be appointed by the mayor to take office upon the effective date of this charter section, shall, by lot, classify their terms so that the term of one commissioner shall expire at 12:00 o'clock noon on each of the first, second and third anniversaries of such date, respectively; and, the terms of the remaining two commissioners shall expire at 12:00 o'clock noon on the fourth anniversary of said effective date; and, on the expiration of these and successive terms of office, the mayor shall appoint commissioners for four-year terms. The compensation of each commissioner shall be $100 per month.

All rights, claims, actions, orders, obligations, proceedings and contracts relating to the airport department under the public utilities commission existing prior to the effective date of these amendments shall not be affected by the adoption thereof, and shall thereafter be under the jurisdiction of the airports commission.

3.691 Powers and Duties

The airports commission shall have and succeed to all powers and duties in the management and control of San Francisco International Airport heretofore vested in the public utilities commission. The airports commission shall have possession, management, supervision, operation and control of said airport and of all other airport properties wherever situated as it may acquire or which may be placed under its control. In locating and determining the character and type of improvements and additions, betterments or extension to airport properties under its control, the

commission shall, in each case, first secure the written recommendation of the director of airports, including analysis of cost, service and estimated revenue of all proposed alternatives determined feasible by said director. Subject to the provisions of Section 7.400 of this charter, the commission shall have the power to purchase, lease or otherwise acquire all such lands, property, improvements or related facilities as it may deem necessary or convenient in the exercise of the authority granted hereunder. Nothing contained herein shall authorize the commission to construct, operate or maintain, at any location outside the boundaries of an airport, systems or facilities for the surface or sub-surface transportation of persons or property, provided, however, that the commission is authorized to expend funds for planning such facilities either inside or outside the boundaries of the airport.

Subject to the provisions of Section 3.598 of this charter, the airports commission shall have power to fix, change and adjust rates and charges for the furnishing of services.

3.692 Airport Departments and Bureaus

The following divisions shall be established under the airports commission: the division of business administration; the division of operations; and the division of planning and development. In addition, the commission may create a bureau of engineering and such other bureaus as it may find necessary for the handling of matters that do not pertain exclusively to any one airport division, and subject to approval of the commission, the director of airports shall appoint or remove the heads of such bureaus, exclusive of the civil service provisions of this charter. The commission shall also appoint a secretary who shall be exempt from the civil service provisions of this charter.

3.693 Director of Airports

The airports commission shall appoint a director of airports, who shall hold office at the pleasure of the commission. The director of airports shall have full power and authority to administer the affairs of the commission as the chief executive officer thereof. Subject to approval of the commission, the director shall

appoint or remove the heads of airport divisions under the commission's jurisdiction. The heads of airport divisions shall be exempt from the civil service provisions of this charter; provided, however, that said director and each division head so appointed shall possess the necessary executive, administrative and technical qualifications for his respective position.

In addition to the powers and duties conferred upon him as elsewhere provided in this charter, the director of airports shall have the power and it shall be his duty:

(a) to enforce all orders, rules and regulations adopted by the commission relating to the regulation, operation or control of the funds, facilities, property and equipment of said commission; and

(b) to supervise and manage the design, construction, maintenance and operation of all work or works authorized by the commission and to that end, subject to its control and guidance, the commission shall have the power to delegate to him such necessary powers and duties as are by this charter conferred upon said commission.

The director of airports shall also have the power to designate and assign by written permit, lands, improvements, space or areas in any hangar or other building at any airport operated or controlled by the commission at the duly established rates or charges for the use thereof and subject to the applicable rules and regulations governing same. Each such permit shall be revocable by the director of airports without compensation to the permittee upon due notice to be stated therein.

Appendix G

Excerpts from Rules and Regulations of the Airports Commission of the City and County of San Francisco

1.3.3(K) RELIGIOUS, CHARITABLE AND POLITICAL ACTIVITIES

No person or group of persons shall (1) offer goods or services for sale or solicit alms or contributions of money or of other articles of value; (2) conduct or participate in any speech making, parading, marching, patrolling, demonstrating, assembling, distributing of pamphlets or other materials, or (3) carry, display, or cause to be displayed any signs or placards in or upon any Airport buildings, or within ten feet of the entrances thereof, in the exercise of their First Amendment Constitutional freedoms, without first obtaining a permit from the Director.

1. A permit shall be issued after a written application is submitted to the Director setting forth the following:

(a) The full name, mailing address and telephone number of the person or organization sponsoring, promoting or conducting the proposed activities;

(b) The full name, mailing address and telephone number of the individual person or persons who will have supervision of and responsibility for the proposed activities.

(c) The purpose of the proposed activities;

(d) A description of the proposed activities, indicating the type of communication to be involved;

(e) The dates and hours on and during which the activities are proposed to be carried out, and the expected duration of the proposed activities; and

(f) The number of persons that propose to engage in said activities at the Airport.

2.(a) If a permit is not issued within three (3) days following receipt of the application by the Director, the applicant must, within said three (3) day period, be furnished a written statement setting forth the reasons why the issuance of the permit is denied

or delayed. In the event that any permit hereunder is delayed or denied, applicant may request a judicial hearing of said denial within three days thereof. The City and County of San Francisco, acting by and through its City Attorney shall within five (5) days following such request, apply to either a state or federal court for a judicial determination as to whether the proposed activities described in the application may be prohibited, naming the applicant as a party defendant. The City shall exert every reasonable effort to have this issue heard on a priority basis on its merits as soon as legally possible. The burden of showing that the proposed activities may be prohibited shall rest on the City.

(b) If the issue for judicial determination described in (a) above is not heard and decided on the merits by the Court within fifteen (15) days from the date the complaint is filed, than [sic] an interim permit shall be deemed issued under this regulation to the applicant by operation of law, and all activities proposed to be carried on in the application for the original permit may be carried on just as though a permit had been duly issued by the Director, subject to the same restrictions and obligations as all other permitted activities. The interim permit shall be deemed renewed each thirty (30) day period for so long as no judicial determination has been made and if the Court so orders from the time such determination is made until the time for appeal therefrom has expired or until a final and binding appellate decision has been reached.

3.(a) Each permit for soliciting or proselyting shall be in the form of a 2½" x 3½" badge designating thereon the months and year for which it is valid and the name of the organization represented, if any.

(b) Every person, while engaged in soliciting or proselyting activity, shall wear said badge on the upper left front portion of the garment being worn, so that said badge will be fully and clearly visible.

(c) All permits shall be issued each month on a first come first served basis. No permit shall be issued by the Director for a period of time in excess of thirty (30) days.

4.(a) The maximum number of persons permitted to conduct soliciting or proselyting shall be regulated by the Director only according to the following schedule:

Groups/Organizations
Not more than two groups—6 persons each
Three groups—4 persons each
Four groups—3 persons each
Five groups—2 persons each
Six groups—1 person each
Maximum number of individuals and/or group members permitted at any one time—12

However, regardless of the number of groups permitted, not more than one person from each group shall be allowed to solicit funds from members of the public at the Airport at any given time. See subsection 6(a)(1) and 6(b).

(b) In the event that two or more persons or organizations seek to conduct the activities described herein at the same time, the Director shall apportion the available areas and times between or among them all on as equitable a basis as possible.

(c) When the Director receives more applications for permits than he is able to grant in accordance with the foregoing, then he may impose such other reasonable and equitable restrictions as to allowable dates or hours or numbers of participants as may reasonably be required to provide fair opportunities as equal as possible for all applicants, while insuring the efficient and effective operation of the Airport.

5. Each permittee shall conduct soliciting or proselyting activities only in those areas of the Airport as are shown in the attached Airport diagram, marked Exhibit "A" and incorporated herein by reference, [diagram not reprinted] and each permittee shall be prohibited from conducting said activities in any other areas of the Airport including but not limited to the following:

(a) All terminal building corridors.

(b) Within ten feet of any stairway, escalator, elevator, concession entrance or doorway, ticket or check-in counter or lines of persons leading thereto, information counter, terminal building

entrance or exit or any area leased exclusively to a tenant of the Airport.

(c) All Airport fingers or piers leading to or coming from aircraft boarding areas, including all boarding areas and rotunda areas connecting thereto.

(d) All baggage pickup areas, restroom and tenant facilities at the Airport.

6.(a) No person, while engaged in any activity permitted in this subsection, shall (1) in any manner physically obstruct, delay or interfere with the free movement of any member of the public at the Airport without said member's consent; (2) grab at or pin flowers, candy or any other item on any member of the public at the Airport without his or her prior consent; (3) misrepresent the permittee's true purpose for proselytizing or soliciting at the Airport; (4) leave unattended on the Airport premises or cause to discard or abandon bags, boxes or other containers of religious or political literature, food or other paraphernalia (except in Airport trash receptacles); (5) use Airport public locker facilities without paying for same or for the storage of foodstuffs; (6) erect or place any furniture, especially within the terminal buildings, without the express written consent of the Director; (7) display, carry or cause to be displayed or carried, any sign or placard within any Airport buildings which exceeds 430 square inches in total area or 1/16 of an inch in thickness or having a staff which exceeds three feet in total length or a cross-sectional dimension of 1" x 1/2"; (8) receive or accept money from any Airport sale or solicitation except at the booth or booths established pursuant to subsection 7 below.

(b) In connection with Section 6(a) (1) above, the practice of "ganging up" or "double teaming" members of the public is specifically prohibited. Proselytizers or solicitors must approach individual members of the public individually. Two or more proselytizers or solicitors shall not confront a member of the public at the same time.

(c) No person, while engaged in any activity permitted in this subsection, shall display or distribute obscene material.

7. The receipt or acceptance of money by the permittee shall take place only at booths furnished by the Director. These booths shall be located in each terminal at such public area points as may be designated from time to time by the Director. In the event that two (2) or more persons or organizations seek the use of booths for the collection of money at the same time, the Director shall apportion the available areas between or among them all on as equitable a basis as possible.

8.(a) Violation of any of the foregoing provisions of this regulation by any person shall result in termination by the Director of the authority of said person to conduct activities and solicitations pursuant to any permit held by any organization which he represents. In the event that three (3) or more violations hereunder by persons representing the same organization occur within a period of two (2) weeks, then the third violation shall serve to automatically terminate any permit which may have been issued to the organization which such person or persons represent. Whenever any person or organization's permit is terminated, the person or organization which held such permit shall thereafter be ineligible to receive any permit under this regulation for a period of one year following the time when the judicial determination provided for hereinafter has become final and binding.

(b) In the event that any permit is terminated under this regulation, permittee may, within three (3) days thereof, request a judicial determination of the matter, and the City and County of San Francisco, acting by and through its City Attorney, shall thereupon within five (5) days following such request, apply to either a state or federal court for a judicial determination as to whether the permit has been lawfully revoked, naming the permittee as a party defendant. The City shall exert every reasonable effort to have this issue heard on its merits without delay and as soon as legally possible. The burden of showing that the permit has been lawfully revoked shall rest on the City.

(c) If the issue for judicial determination described in (b) above is not heard and decided on the merits by the court within fifteen (15) days from the date the complaint is filed, then an interim permit shall be deemed issued under this regulation to the

applicant by operation of law, and all activities proposed to be carried on in the application for the original permit may be carried on just as though a permit had been duly issued by the Director, subject to the same restrictions and obligations under this regulation as all other permitted activities.

(d) The interim permit shall be deemed renewed each thirty (30) day period for so long as no judicial determination has been made on the issue and if the Court so orders from the time such determination is made until the time for appeal therefrom has expired or until a final and binding appellate decision has been reached.

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-918

In The
Supreme Court of the United States
October Term, 1986

CITY AND COUNTY OF SAN FRANCISCO, etc., *et al.*,

Petitioners,

vs.

CHRISTIAN SCIENCE READING ROOM JOINTLY MAINTAINED, etc. *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in analyzing this matter as an equal protection question rather than a question of first amendment access to a "non-public forum" where respondents' complaint was not that they had been denied access to the public areas of the Airport in order to exercise free speech rights, but rather that the Christian Science Reading Room, alone of all the tenants in the South Terminal of the San Francisco International Airport, had been selectively denied the right to continue to rent commercial space on an arms-length basis as a result of petitioners' determination that it was conducting "religious activities" on the premises?

2. Did the Court of Appeals err in refusing to permit petitioners to justify their conduct under the rational basis equal protection test by fictional post-hoc rationales, where the unchallenged findings of the trial court established both the actual basis for petitioners' actions and the fact that the post-hoc rationales proffered by counsel were not relied on?

LIST OF ALL PARTIES

Petitioner City and County of San Francisco is a municipal corporation. Petitioner Airports Commission of the City and County of San Francisco is the agency designated by the San Francisco City Charter to manage the San Francisco International Airport. Petitioner Louis A. Turpen is the Director of Airports of the City and County of San Francisco. Morris Bernstein, J. Edward Fleishell, Ruth E. Kadish, Z. L. Goosby, and William K. Coblentz are members of the Airports Commission.

Respondent Christian Science Reading Room Jointly Maintained is a California non-profit religious corporation. Respondent David M. Sacks is an adherent of the Christian Science faith, who has in the past availed himself of the services of the Reading Room facility at the San Francisco International Airport, and who intends to do so in the future.

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COUNTER-STATEMENT OF THE CASE

As set forth in petitioners' Petition for Writ of Certiorari ("Petition"), this case concerns the constitutionality of the decision of petitioner Airports Commission of the City and County of San Francisco ("Commission") to discontinue renting commercial space in the San Francisco International Airport to respondent, Christian Science Reading Room Jointly Maintained ("Reading Room").

Contrary to the statement set forth in the Petition, however, this case does not concern any assertion on behalf of respondents that they are "guaranteed the right, under the First Amendment's Free Speech and Free Exercise of Religion clauses, to rent commercial space . . ." In fact, what this case has always been about is whether petitioners may select the Reading Room, which since 1957 has been an arms-length, non-preferred, rent-paying tenant of the Airport, for discriminatory eviction based upon petitioners' unfounded and incorrect concern that continuing to rent space to the Reading Room would somehow violate either the establishment clause of the United States Constitution (the United States Constitution, 14th Amendment, § 1) or the "preference" clause of the California Constitution (California Constitution, Article I, § 4). The Reading Room has never sought a "guarantee of access;" it has sought merely to be treated like any other similarly situated tenant of the San Francisco International Airport.

The facts underlying this dispute are fully set forth in the Order Granting Permanent Injunction entered by the Honorable Samuel J. Conti of the United States District Court for the Northern District of California. That Order contains 32 specific findings of fact which are set

forth at Appendix E of the Petition. Those factual findings, which are unchallenged by petitioners, establish that the Reading Room has occupied rental space at the Airport for nearly thirty years, paying rent for the premises occupied at a rate determined by the Commission, and never receiving any preference, in either the amount of rent or other terms of tenancy, over similarly situated Airport tenants. Indeed, the Reading Room's rental was at all times determined by the Commission pursuant to the Commission's standard rental rate schedule. (Finding No. 8.)

On March 21, 1984, the Commission served an eviction notice on the Reading Room requiring it to vacate the premises by April 21, 1984. The letter assigned, as the reason for the action, the Commission's determination that it would no longer issue leases or permits for any "religious activity" at the airport. (Findings of Fact 17 and 18.) Thereafter, on April 17, 1984, the Commission promulgated a new policy declaring that it would not "provide space at San Francisco International Airport for conduct of religious activities, except as specified by Rules and Regulations relating to first amendment activities." (Finding No. 19.) This policy, and the decision to evict the Reading Room, was based *solely* on the Commission's concern that permitting the Reading Room to continue its tenancy would violate the establishment clause of the first amendment of the United States Constitution. (Finding No. 24.)

The Commission's action against the Reading Room came in connection with a general relocation of tenants during the course of airport renovation. All or virtually all tenants similarly situated to the Reading Room, were offered relocation in connection with the renovation pro-

cess. The Reading Room alone was evicted. (Finding No. 21.) The trial court specifically found that petitioners' actions were not motivated by any of the post-hoc rationales suggested by petitioners' counsel. The Reading Room was not evicted due to lack of space, in order to maximize rental income to the airport, on the basis of any "passenger survey," or because the Reading Room had a "permit" and not a "lease." (Findings No. 28-31.)

In the wake of the Commission's action, the Reading Room filed this lawsuit. On May 8, 1984, the District Court issued a permanent injunction and entered judgment for respondents, holding that petitioners' actions had violated Respondents' right to free exercise of religion and equal protection. Following petitioners' appeal, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the trial court on equal protection grounds. Petitioners' petition for rehearing en banc was denied and the instant petition followed.

REASONS FOR DENIAL OF THE WRIT

I. The Unchallenged Findings of Fact Compel the Result Below.

The findings of fact entered by the District Court—findings unchallenged by petitioners—not only compelled the disposition entered below, but rendered that disposition fairly unextraordinary. The District Court found that the Reading Room, alone, was singled out for eviction rather than relocation. The District Court further found that the decision to single out the Reading Room was premised entirely upon petitioners' incorrect assumption that continuing to treat the Reading Room like its other tenants

would result in a violation of either the establishment clause of the United States Constitution, the preference clause of the California Constitution or both. The District Court held, and the Ninth Circuit affirmed, that the rental of airport commercial space on an arms-length basis to the Reading Room violated neither the federal nor California constitution. In their petition to this Court, petitioners apparently concede the correctness of the Ninth Circuit's establishment clause analysis; they do not present it as a question for this Court.

On the unchallenged facts found below, the conclusion that petitioners' actions violated the equal protection clause, regardless of which equal protection test is used, is neither novel nor noteworthy, and it certainly does not merit the attention of this Court. The question of whether the Ninth Circuit properly applied the rational basis test will be discussed below.

II. Petitioners' "Public Forum" Argument Cannot Obscure The Fact That This Matter Has Been Properly Decided On Equal Protection Grounds.

Petitioners have now offered this Court the same red herring offered to and rejected by the Ninth Circuit and the District Court; their "public forum" argument. Petitioners again argue that the airport, as a "limited public forum" or a "non-public forum," may make "reasonable" distinctions between tenants seeking to rent commercial space, so long as such distinctions are not based upon "viewpoint discrimination."

But petitioners cannot avoid their equal protection problems by trying to squeeze this case into the "public forum" category. Petitioners have no objection to the

Reading Room's message. Indeed, counsel for petitioners have repeated throughout this case that petitioners would be happy to issue the Reading Room a permit, as it does for other non-profit groups, both religious and secular, to share rent-free space on a rotating basis for the exercise of first amendment rights. Respondents' complaint is not that petitioners have denied them access to the Airport, but rather that petitioners have sought to prohibit the Reading Room from continuing to rent space on a commercial, arms-length basis as the Reading Room's similarly situated co-tenants do. Thus, the question is not access, but, rather, whether the Reading Room may be singled out for disparate treatment based upon what petitioners perceive is its character as a religious facility.

This is not a public forum case. It is an equal protection case and was properly decided as such by the Ninth Circuit.

III. The Court of Appeals For The Ninth Circuit Properly Applied The Rational Basis Standard Of Review.

Petitioners' final argument betrays a basic misunderstanding of equal protection law. Petitioners suggest that in every case, where a hypothetical post-hoc governmental purpose can be imagined which is rationally related to the action taken, even where it is demonstrated that the *real* governmental purpose had nothing to do with the hypothetical rationales, the action passes muster under the rational basis test.

Petitioners purport to rely principally on *Fleming v. Nestor*, 363 U.S. 603 (1960) and *Vance v. Bradley*, 440 U.S. 93 (1979), for the proposition that, in the application of the

rational basis equal protection standard, courts are bound to accept any hypothetical governmental purpose government counsel might offer. That is not the law. It is true that this Court has held that where "there are plausible reasons for [the government's] action," the Court's inquiry is at an end; and that whether the proffered reasoning in fact underlay the governmental action is "constitutionally irrelevant." *See United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 179 (1980). Neither in *Fritz,* nor in any case that counsel are aware of, however, did the Court hold that post-hoc rationales are to be accepted where the record compels the conclusion that the proffered rationales could *not* have underlay the governmental action. Indeed, in *Weinberger v. Weisenfeld,* 420 U.S. 636, 648 n.16 (1975), this Court counseled against consideration of a hypothetical purpose where it is clear that "the asserted purpose could not have been a goal of the [policy]." *See also Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463 n.7 (1981).

As the Ninth Circuit recognized in its opinion below, the uncontested factual findings in this case absolutely preclude the possibility that any of the hypothetical purposes proffered by counsel for petitioners had anything to do with the *actual* purpose of the eviction of the Reading Room. That court's decision, therefore, was completely in line with established equal protection doctrine.

This case does not raise the question of the amount of deference to be accorded the legislature where it is *possible* that a legitimate governmental purpose was rationally related to the discriminatory action in question. Here, there is no such possibility. As petitioners' rental arrangement

with the Reading Room was in full compliance with the applicable provisions of both federal and state constitutions, neither petitioners' "anti-religious activities" policy nor their eviction of the Reading Room was rationally related to the avowed purpose of complying with those constitutions.

———o———

CONCLUSION

This matter is not worthy of the Court's attention. Petitioners, without any responsible consideration or study of the issues, casually concluded that the continued tenancy of the Reading Room at the airport might somehow violate the state or federal constitution, and on the basis of that conclusion—and on no other basis—determined to terminate that tenancy. Petitioners' suggestion that the Ninth Circuit's decision "will launch federal courts upon an improper and dangerous course of inquiry into the actions of their coequal branches of government," is without merit. If the rational basis standard means anything, courts must examine the relationship between a known and acknowledged governmental purpose and the challenged classification purportedly intended to advance that purpose.

No one in this case has asked any court to speculate on petitioners' motives. They are known. Should it ever be held that the courts are bound to accept post-hoc hypothetical rationalizations for a challenged classification, even where the actual governmental purposes are known and not rationally related to that classification, then the courts would indeed be on "an improper and dangerous course."

The Court of Appeals for the Ninth Circuit properly considered and decided this case on the basis of established equal protection law. Respondents therefore respectfully urge the Court to deny the petition for certiorari.

Respectfully submitted,

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